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No. 924

In the Supreme Court of the United States

OCTOBER TERM, 1960

ANTHONY ASTORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 26–34) has not yet been reported. The opinion of the district court (Pet. App. 21–25) is not reported.

JURISDICTION

The judgment of the court of appeals was entered March 27, 1961. The petition for a writ of certiorari was filed April 25, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence supports petitioner's conviction for aiding and abetting the transportation of obscene films.

STATEMENT

In the United States District Court for the Southern District of New York petitioner was convicted by the court sitting without a jury of the transportation of obscene films in interstate commerce in violation of 18 U.S.C. 1465 and was sentenced to imprisonment for two years. Petitioner was found guilty on the theory that he aided and abetted the transportation which was actually performed by the buyer of the films, Moses Shipman, who pleaded guilty.

The principal witness for the government was petitioner's partner Gold, who had pleaded guilty. Gold testified that in July or August, 1958, he and petitioner became joint owners of the Bergen Film Laboratory in Lodi, New Jersey, which among other activities sold "stag" films (R. 27–28, 31–32). Gold had been selling such films to Shipman, who was from New York, since about 1957, and continued to do so after going into partnership with petitioner (R. 31). At one time in 1958 when Gold met Shipman in New Jersey, petitioner happened to come by, and Gold introduced Shipman to petitioner as the man from New York who "buys the stuff" (R. 37). In October 1958, Shipman did not meet Gold in New Jersey as arranged because he thought he was being followed. Gold reported this to petitioner (R. 32–34).

In January 1959 Shipman placed an order and asked that it be delivered in New York on credit (R. 34). Gold refused to make delivery in New York. He reported Shipman's request to petitioner

who agreed to extend credit (R. 35). Petitioner helped Gold wrap the packages for delivery to Shipman (R. 35). Gold met Shipman at a parking lot in Lodi on January 20, 1959, but, because Shipman was suspicious of a car on the premises, he and Gold drove off separately and stopped about a quarter of a mile away. Gold delivered two packages of films which Shipman took to New York (R. 36, 101–102). F.B.I. agents followed Shipman's car to the parking lot, saw Shipman enter another car and return to his own car, saw both cars leave the parking lot and travel some distance, but then lost sight of the car (R. 10).

Shipman testified that the transfer took place in the parking lot (R. 101–102) and that he had never been introduced to petitioner (R. 102, 106). Petitioner, when he took the stand, denied that he had ever met Shipman. He said he knew that Gold was selling films but that he, petitioner, did not participate in the illegal activities (R. 114–120).

ARGUMENT

The sole issue raised by petitioner is the sufficiency of the evidence to show that he was an aider and abettor of the transportation of the obscene films. He does not deny that the crime was established, and he does not challenge the ruling of the court below that one who supplies obscene films banned from interstate commerce to a buyer, with knowledge that the buyer intends immediately to take the films in interstate commerce, is an aider and abettor of

the transportation.[1] Petitioner's argument in this Court is simply that Gold was not worthy of belief and that, even if believed, Gold's testimony did not show sufficient participation in the venture by petitioner to make him an aider and abettor. These contentions are clearly without merit and do not deserve further review.

The credibility of Gold's testimony was for the trier of fact who explicitly resolved that issue against petitioner (Pet. App. 22). As the court of appeals pointed out, Gold's credibility is supported by the fact that his account of the events of January 20, 1959 (that the delivery did not take place at the parking lot) is consistent with the observations made by the federal agents, while Shipman's testimony (that delivery was made at the parking lot) is not. Moreover, Gold's testimony that Shipman failed to keep an appointment in October 1958 was corroborated by the testimony of the agents who saw Shipman cross into New Jersey and turn back on that date (R. 96–97).

Gold's testimony, if credited, shows that petitioner was an equal partner in the sale of obscene films, that petitioner knew of the course of dealing with Shipman in New York, that he specifically approved the sale on credit which occurred on January 20, 1959, and that he assisted in packaging the film for delivery on that date. This showed the kind of sharing

[1] This ruling was clearly correct. See the prior opinion of the court below in *United States* v. *Russo*, 284 F. 2d 539 (C.A. 2). See also *Backun* v. *United States*, 112 F. 2d 635 (C.A. 4); *Metcalf* v. *United States*, 195 F. 2d 213 (C.A. 6).

in the venture which could properly be held to constitute aiding and abetting. *Nye and Nissen* v. *United States*, 336 U.S. 613.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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